

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

SAFE SKIES CLEAN WATER
WISCONSIN, INC.,

Plaintiff,

Case No. 3:20-cv-1086-wmc

v.

NATIONAL GUARD BUREAU, *et al.*,

Defendants.

DEFENDANTS' PROPOSED FINDINGS OF FACT

Pursuant to Sections I.A.2 and II.B of this Court's Summary Judgment Procedures, ECF No. 9 ¶ 5, Defendants provide the following proposed findings of fact:

1. The 115th Fighter Wing ("115 FW") installation (also known as "Truax Field") of the Wisconsin Air National Guard ("WIANG") is located within the boundaries of Dane County Regional Airport in Madison, Wisconsin. Bates No. 1, SCW_20.

2. The 115 FW installation is approximately 155 acres in size, and has over 40 buildings/structure. *Id.*

3. The 115 FW's federal mission is to staff and train flying and support units to "augment Air Combat Command's general-purpose fighter forces to effectively and rapidly deliver F-16 combat power anywhere in the world for wartime or peacetime missions." *Id.* The 115 FW also provides "an Aerospace Control Alert commitment for the region under the North American Aerospace Defense Command." *Id.*

4. The 115 FW's state mission is to provide trained and equipped units to protect life and property and to preserve peace, order, and public safety as directed by the Governor of Wisconsin. *Id.*

5. In support of those missions the 115 FW currently operates 18 F-16 C/D aircraft and 1 RC-26B aircraft. Bates No. 1, SCW_20.

6. For the 115 FW to continue to meet its mission goals, the National Guard Bureau ("NGB"), through the Air National Guard ("ANG") must provide the 115 FW with facilities that are properly sized and configured. *Id.* at SCW_19.

7. The NGB identified that the current facilities at Truax Field did "not adequately support current or future mission requirements and/or are not adequately sized." Bates No. 1, SCW_27.

8. A 2012 Installation Development Plan ("IDP") analyzed development plans and needs at Truax Field. Bates No. 61, SCW_11816-17; *see also id.* at SCW_11820-23.

9. The IDP was intended to "outline[] a strategy to modernize facilities and maximize infrastructure to meet current mission requirements for the 115 FW" and "explains the logic and reasoning for the proposed capital improvements." *Id.* at SCW_11799.

10. A January 2016 "Facilities Board" meeting addressed, among other things, updates to the 115 FW IDP in the FY2016 IDP review. Bates No. 64, SCW_12095; *see also id.* at SCW_12103-07; Bates No. 70 (FY2016 IDP Review), SCW_12453-58; Bates No. 72, SCW_127460 (IDP used to identify "high level projects that both affect current mission and future mission objectives"); *id.* at SCW_12788-92.

11. In the draft Environmental Assessment ("EA") the NGB proposed 27 construction, demolition, and renovation projects (the "Projects") to "support the current

mission” by “provid[ing] adequate space needed to fulfill mission requirements,” such as “consolidate[ing] job functions” and “improve[ing] workflow.” SCW_27; *see also* SCW_28-32 (listing projects).

12. In particular, the NGB stated that the Projects:

“provide the facilities and training opportunities necessary to ensure that the 115 FW can accomplish their mission in a safe and efficient manner. For the 115 FW to continue to meet their mission goals, the NGB needs to provide facilities that are properly sized and configured to meet the demands of the continuously evolving mission of the 115 FW. The proposed construction and renovation projects will improve mission efficiency by improving base access and utilities, consolidating mission functions, and upgrading facilities to meet current safety and security standards. The proposed demolition actions will remove excess, obsolete, deteriorating, and underused facilities.”

Bates No. 1, SCW_03; *see also id.* (“The construction is also necessary to replace outdated facilities and to secure assets.”).

13. Further, the NGB noted that “[m]any of these facilities do not adequately support *current* or future mission requirements and/or are not adequately sized. Under the Proposed Action, the 115 FW will implement 27 infrastructure improvement projects, including the demolition of 7 facilities, in order to support the *current* mission [].” *Id.* at SCW_04 (emphasis added); *see also id.* at SCW_19 (“The proposed construction and renovation projects would improve mission efficiency by improving base access and utilities, consolidating mission functions, and upgrading facilities to meet current safety and security standards. The proposed demolition actions would remove excess, obsolete, deteriorating, and underused facilities.”); *id.* at SCW_27 (the “[t]wenty-seven infrastructure improvement projects” in the EA were needed “to support the current mission. These improvement projects would provide adequate space needed to fulfill mission requirements and would consolidate job functions and improve workflow.”).

14. In the NGB's consideration of comments matrix, it noted that the EA "projects are related to the current mission and are independent of the F-35 EIS basing decision." Bates No. 59, SCW_11728.

15. The NGB also explained that the Projects would "comply with [ANG] Instruction 32-1023, *Criteria and Standards for Air National Guard Construction*, and ANG Handbook 32-1084, *Facility Space Standards*. The construction is also necessary to replace outdated facilities and to secure assets. New facilities would adhere to *DoD Minimum Antiterrorism Standards for Buildings, as presented in Unified Facilities Criteria* [] 4-010-01, effective 9 February 2012, Change 1, 01 October 2013, when required by AFI 32-1032 (September 24, 2015), *Planning and Programming Appropriated Fund Maintenance, Repair, and Construction Projects*." Bates No. 1, SCW_19.

16. In particular as to Project No. 15, the final EA notes that "[t]he existing boundary fence is not currently up to airport BASH standards." Bates No. 1, SCW_30.

17. "BASH" standards provide that, among other things, fencing surrounding airports should be 10 feet high. *See* Bates No. 67, SCW_12239, Bates No. 69, SCW_12449; *see also* Fed. Aviation Admin., *National Part 139 CertAlert No. 16-03*, at 2 (Aug. 3, 2016) (*available at* https://www.faa.gov/airports/airport_safety/certalerts/media/part-139-cert-alert-16-03.pdf).

18. The IDP also identified that new fencing was necessary to create a security perimeter in the maintenance area. Bates No. 61, SCW_11900, SCW_11902 (fence would "mitigate" various "safety concerns"); *see also* Bates No. 64, SCW_12107.

19. As to Project No. 19, the NGB explained that construction of a "1,500 SF bay on the south side of B430 for a second crash truck" would "provide adequate space needed to fulfill mission requirements." Bates No. 1, SCW_30.

20. On February 7, 2019 a draft Description of Proposed Action and Alternatives (“DOPAA”) was circulated to various stakeholders, including other federal and state agencies, and several federally-recognized tribes. SCW_25; *see also* SCW_127-142.

21. The ANG received two responses (one was a “no comment”), Bates No. 1, SCW_137, and addressed the substantive comment in the draft EA. Bates No. 63, SCW_12023-90.

22. The ANG issued notice of the draft EA and draft FONSI on April 7, 2019 and April 21, 2019, and invited public comments through May 7, 2019 (with a subsequent extension of the public comment period through May 21, 2019). SCW_25; *see also* SCW_143-46 (federal and state agency comments); SCW_155-75 (public comments); Bates No. 59, SCW_11728 (response to comments).

23. The NGB placed notice of the draft EA in the Wisconsin State Journal. *See* Bates No. 1, SCW_157-58.

24. On October 22, 2019, the ANG signed a Finding of No Significant Impact and issued the final EA. SCW_03-12 (FONSI); SCW_13, *et seq.* (final EA).

25. At largely the same time as the ANG was preparing the final EA at issue in this case, the United States Air Force was preparing an Environmental Impact Statement (“EIS”) for basing F-35A fighter jets. That EIS reviewed and analyzed five bases, including Truax Field, as future sites for locating F-35A aircraft. *See* SCW_105. The Notice of Intent to conduct the EIS was published February 7, 2018, 83 Fed. Reg. 5,408 (Feb. 7, 2018), the draft EIS was proposed on August 9, 2019, 84 Fed. Reg. 39,296 (Aug. 9, 2019), and, after receiving and responding to comments from the public, the EIS was finalized on February 28, 2020. 85 Fed. Reg. 11,986 (Feb. 28, 2020).

26. That EIS is the subject of a separate lawsuit brought by plaintiff in the U.S. District Court for the District of Columbia. *Safe Skies Clean Water Wisconsin, Inc. v. U.S. Air Force*, No. 21-634 (D.D.C.) (J. Kollar-Kotelly).

27. Although the effects of basing F-35As at Truax Field is not analyzed in the final EA, the NGB noted that “[i]mpacts to land use due to noise under the proposed USAF F-35A Air National Guard Operational Beddown would be significant.” Bates No. 1, SCW_109.

28. In addition, the NGB explained that “[t]he replacement of the F-16 with the F-35A would result in an increase in long-term emissions.” *Id.* at SCW_108. “The GHG emissions associated with the F-35A beddown EIS have been estimated at 731 tons for the construction projects.” *Id.*

29. The NGB also stated that “[t]he total [emissions] for F-35A construction projects and construction projects evaluated in this EA would be 4,136 [tons of CO₂], which is the equivalent of 808 cars each driving the national average of 11,500 miles per year.” *Id.* at SCW_108-09.

30. “PFAS refers to a large group of man-made chemicals that include PFOA [perflourooctanic acid], PFOS [perfluorooctane sulfonate], GenX, and thousands of other chemicals.” Bates No. 1, SCW_68. “PFOA and PFOS have been the most extensively studied and are currently the only two PFAS chemicals for which the [U.S. EPA] has established lifetime drinking water Health Advisories for ground water ... and calculated Regional Screening Levels for soil.” *Id.*

31. PFAS is present at Truax Field from historic use and storage of “Aqueous Film Forming Foam,” Bates No. 53, SCW_11571, which was used for fire suppression at various locations. *Id.* at SCW_11575-79.

32. In December 2015, the NGB received the results of a “Preliminary Assessment” (“PA”) into PFAS at Truax Field. *See* Bates No. 53, SCW_11563.

33. The PA was intended to “identify potential locations of historic releases of Aqueous Film Forming Foam [] from usage and storage” to “determine if a site posed a potential threat to human health and the environment and required additional inspection. Bates No. 17, SCW_1960.

34. The PA concluded, in part, that:

“[t]en potential release sites have been identified at the WIANG Base Of those ten sites, nine are recommended for further investigation. Further investigation is recommended at the Base to monitor and characterize any groundwater, soil, sediment, and/or surface water [] contamination onsite. Sampling of soil and groundwater within the Base and at the outfalls of Starkweather Creek is recommended at a minimum to evaluate the potential of migration of [PFAS]. In addition, verification of the structural integrity of the Base sanitary sewer is advised.”

Bates No. 53, SCW_11583; *see also id.* at SCW_11584-85; Bates No. 1, SCW_68.

35. Following the findings in the PA, the NGB commissioned a more detailed site inspection (“SI”), which was completed on April 1, 2019. Bates No. 17, SCW_1941

36. The SI is a more detailed investigation to test for the “presence/absence” of compounds, including PFAS, and to determine whether “remedial investigation” is necessary. *Id.* at SCW_1961.

37. That investigation included groundwater and soil sampling. *See id.* at SCW_1980.

38. The SI recommended further investigation into the nine potential release locations (“PRLs”) identified in the PA. *Id.* at SCW_1957; *see also id.* at SCW_1958 (summarizing conclusions as to each PRL); *id.* at SCW_1998.

39. In particular, the SI recommended additional investigation into PFAS concentrations in groundwater at all nine PRLs, and additional investigation at two PRLs to determine PFAS concentrations in soil and any releases. Bates No. 17, SCW_2003; *see also id.* at SCW_2004 (summarizing findings); Bates No. 1, SCW_68 (“A site inspection was conducted to follow-up on the PLRs identified in 2015, and indicated that three of the nine PRLs are locations where construction is planned to occur); *id.* at SCW_69-71 (identifying and describing locations in more detail). As a result, the NGB will conduct a Remedial Investigation. Bates No. 1, SCW_68.

40. Based on those findings, the NGB concluded in the final EA that:

“a Media Management Plan [(“MMP”)] is recommended for two project areas. If any contaminated media (e.g., soil, groundwater) were encountered during the course of site preparation (e.g., clearing, grading) or site development (e.g., excavation for installation of building footers) for any of the projects under the Proposed Action, samples will be collected to determine whether the media are contaminated, and contaminated media will be segregated for off-site disposal or for on-site reuse as appropriate.”

Bates No. 1, SCW_11; *see also id.* at SCW_101 (“Soil and groundwater disturbance is expected to occur during demolition and construction of the addition. The 115 FW would evaluate all investigative findings up to the initiation of construction activities and develop a [MMP] to identify, contain, and properly dispose of [PFAS] above Federal and/or State regulatory limits in soil and groundwater.”).

41. The MMP “could include media sampling protocol in accordance with the [SI] or Remedial Investigation Work Plans, media characterization, erosion control [], and media disposal requirements based on current State and Federal guidelines on [PFAS].” Bates No. 1, SCW_101-02; *see also id.* at 103.

42. In considering comments from the Wisconsin Department of Natural Resources, the NGB made certain changes to the final EA, including indicating that it would be preparing a Remedial Investigation of the sites identified in the SI. Bates No. 59, SCW_11743. The NGB also indicated that the final EA would provide more detail about the SI, would reiterate the use of MMPs, and clarified the two projects that would potentially encounter PFAS contamination. *Id.* The NGB also explained that construction taking place in the PRLs would be unlikely to disturb groundwater due to the depth of construction, and that MMPs would be used to address contaminated soil and any potential runoff to ensure no contamination occurred off Truax Field. *Id.*

43. In particular, the NGB explained that “[c]onstruction best management practices can be implemented to help ensure that PFAS-impacted soils or storm water run-off from the construction sites do not discharge to outfalls, and eventually to the nearby surface water bodies.” Bates No. 59, SCW_11730.

44. The two projects located in areas with PFAS contamination are projects Nos. 15 and 19. Bates No. 59, SCW_11743. Project No. 15 is construction of a new “boundary fence,” Bates No. 1, SCW_06, and project No. 19 is construction of a “Fire Department Crash Truck Bay.” *Id.* at SCW_07.

45. The NGB concluded in the final EA that “[w]ith proper media management no *further* contamination or migration of PFOS or PFOA from the soil or groundwater would be expected to occur.” Bates No. 1, SCW_102.

46. In particular, for construction of the boundary fence (project No. 15), the NGB concluded that “[t]he groundwater in this area is located at 7 to 8 feet below ground surface. The

fence construction will not reach this depth therefore no impact to groundwater is expected to occur.” *Id.* at SCW_102; *see also* Bates No. 59, SCW_11730.

47. As to environmental justice, the NGB evaluated the presence of minority communities surrounding Truax Field, Bates No. 1, SCW_62-63, and “concluded that populations, including minority populations and low-income populations outside the boundaries of the installation and airport, will not be significantly impacted by implementation of the Proposed Action. Therefore, implementation of the Proposed Action will not disproportionately impact minority or low-income populations.” *Id.* at SCW_11.

48. In particular, the NGB noted that “contamination within Starkweather Creek is not expected to increase due to construction” because “excavated soil and/or groundwater would be properly disposed of” and “[t]he two Proposed Action projects within the footprint of [the PFAS PRLs] would include the development of a [MMP] if contamination is still present above federal and/or state regulatory limits at the time of construction.” *Id.* at SCW_94.

49. The final EA estimates emissions from the Projects in number of places. *See* Bates No. 1, SCW_76-77 (construction emissions), *id.* at SCW_78 (greenhouse gas emissions). Emissions were calculated using the Air Force’s Air Conformity Applicability Model, which utilizes the Environmental Protection Agency’s air quality thresholds. Bates No. 1, SCW_179-80.

50. In particular, the final EA explained that:

“[t]he proposed construction activities would contribute directly to GHG emissions from fossil fuels. Demolition and construction activities would generate 3,405 tons of CO₂e emissions in 2020. To put these emissions in perspective, 3,405 tons of GHGs is the equivalent of 665 cars driving the national average of 11,500 miles per year ... [t]hese GHG emissions would only be generated during the construction period. The operation of new facilities may result in a small increase in installation-related GHG emissions, primarily through the consumption of electricity and

possibly through the combustion of fossil fuel on-site if any oil or natural gas boilers or other heating units are installed in the new facilities.”

Id. at SCW_78.

51. The NGB also explained that “the GHG emissions generated from the construction activities and building operations alone would not be enough to cause global warming, in combination with past and future emissions from all other sources they would contribute incrementally to the global warming that produces the adverse effects of climate change.” *Id.* at SCW_78.

52. The NGB also looked at effects of the Projects on water, *id.* at SCW_110-11, and dispersal of hazardous materials, Bates No. 1, SCW_113-14.

53. As to noise, the final EA acknowledges that “[u]nder the Proposed Action at the 115 FW installation, construction projects are inside the installation boundaries and would introduce short-term noise increases; however, these would not generate noise levels to cumulatively affect or change land use compatibilities ... [t]he [Projects] described in this EA would not contribute additional cumulative impacts to land use.” *Id.* at SCW_109.

54. Finally, as to alternatives, the NGB explained that “[d]uring the project siting phase, alternative locations for each construction project were evaluated based on the mission needs of each unit and other selection criteria such as the ability to collocate like services, site availability, and facility condition. Based on this evaluation, with the exception of those projects that have alternative locations and those alternatives listed below, the proposed location for each of the construction projects was determined to be the only feasible alternative that met the purpose and need of this Proposed Action.” *Id.* at SCW_33.

55. No party that submitted comments on the draft EA, including Plaintiff, raised the issue of proceeding with an alternative that eliminated those projects that would take place in PRLs. *See generally* Bates No. 59.

Respectfully submitted this 30th day of July, 2021,

TODD KIM
Assistant Attorney General
United States Department of Justice
Environment & Natural Resources Division

/s/ Gregory M. Cumming

Gregory M. Cumming (D.C. Bar No. 1018173)
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
150 M St., N.E.
Washington, D.C. 20002
(202) 598-0414 (phone)
gregory.cumming@usdoj.gov

Counsel for Defendants